Tentative Rulings for October 23, 2018
Departments 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

17CECG01439 ***Rivera v. Chavez*** **(Dept. 403)**

16CECG03890 ***Gomez v. Chapman*** **(Dept. 502)**

16CECG02347 ***Slosar v. Pristine Surgery*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

18CECG00289 ***Allen v. Board of Administration California Public Employees' Retirement System*** **– the hearing on the writ of mandate is continued to November 8, 2018 at 3:30 p.m. in Dept. 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

(29)

Tentative Ruling

Re: ***Real Goods Solar, Inc. v. Sons, et al.***
Case No. 17CECG03203

Hearing Date: October 23, 2018 (Dept. 403)

Motion: Plaintiff's motion for judgment on the pleadings

Tentative Ruling:

To deny. (Code Civ. Proc. §§ 1005, 439.)

Explanation:

There is no proof of service showing that Defendant Sons was served with the instant motion. (See POS, 8/29/2018 [service on Imperial Rapid Service, Inc.].) Also, there is no declaration regarding meeting and conferring prior to filing the instant motion. Plaintiff's motion for judgment on the pleadings is therefore denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: **RTM** on **10/18/18**
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***State Farm Mutual Automobile Insurance Company v. Boykin***
Case No. 14CECG02124

Hearing Date: October 23, 2018 (Dept. 403)

Motion: Plaintiff's Motion to Enforce Settlement Agreement and Enter Judgment

Tentative Ruling:

To grant the plaintiff's motion to enforce the settlement agreement and enter judgment pursuant to its terms. (Code Civ. Proc. § 664.6.) However, the court intends to deny plaintiff's request for $3,521.19 in attorney's fees, as plaintiff's counsel has not provided any evidence as to the amount of time he spent on the case or his hourly rate.

Explanation:

Under Code of Civil Procedure section 664.6, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

"If the court determines that the parties entered into an enforceable settlement, it should grant the motion and enter a formal judgment pursuant to the terms of the settlement. The statute expressly provides for the court to 'enter judgment pursuant to the terms of the settlement.'" (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182-1883, internal citations omitted.)

Here, the parties entered into a written settlement agreement, in which plaintiff agreed to dismiss the action in exchange for defendant and her insurer paying plaintiff $18,078.00. (Exhibit A to Mahfouz decl.) Defendant's insurer agreed to pay $8,078.00, and defendant agreed to pay the remaining $10,000 in installments of $100 per month starting on May 1, 2016, and continuing on the first of each month thereafter until the full amount was paid. (*Ibid*.) If defendant failed to make any payments as agreed, she would be deemed to be in default on the agreement. (*Ibid*.)

In the event of a default by defendant, plaintiff's counsel agreed to give written notice of the default to defendant and give her 10 days in which to remedy the default. (*Ibid*.) If the defendant did not remedy the default, the plaintiff's attorney could then bring an ex parte motion to enter judgment against defendant without further notice. (*Ibid*.) "Judgment shall be entered in the amount of $25,423.92, plus interest on that amount, at the legal rate, from May 1, 2016, plus all costs of suit and reasonable attorney's fees, as well as any additional costs incurred in the enforcement of this agreement, less any payments that have been made by Defendant and Defendant's insurance carrier to Plaintiff, as of that date." (*Ibid*.)

Plaintiff's counsel alleges that defendant's insurer paid $8,078.00 as agreed, but that defendant herself has failed to make any payments other than $808.80. (Mahfouz decl., ¶¶ 7, 9.) Plaintiff's counsel sent written notice of the default to defendant on several occasions. (*Id*. at ¶ 9.) However, to date defendant has not remedied the default, and there is an outstanding balance that remains unpaid under the agreement. (*Id*. at ¶ 10.)

Therefore, plaintiff is entitled to enforce the terms of the settlement agreement and have a judgment entered against defendant pursuant to the agreement. Also, according to the terms of the agreement, defendant is liable for the full amount of damages originally claimed by plaintiff, or $25,423.92, and not just the $18,078 she originally agreed to pay to settle the claim. She is also liable for prejudgment interest, costs, and attorney's fees. However, she is entitled to an offset for the amounts she and her insurer have already paid to defendant, or $8,886.80.

However, to the extent that plaintiff seeks its attorney's fees incurred in the case, plaintiff's counsel has not provided any admissible evidence about the time he spent on the case or his hourly rate. While the settlement agreement does allow plaintiff to recover its attorney's fees, here there is no evidence on which to base a fee award. Plaintiff's request for $3,521.19 in fees is simply based on the default attorney's fees schedule in the Fresno County Superior Court Local Rules, which only applies in cases where the plaintiff seeks a default judgment in actions on promissory notes, contracts, and foreclosures. (See Fresno Superior Court Local Rules, Appendix A1.) Here, plaintiff is not seeking a default judgment, and the action is not based on a promissory note, contract, or foreclosure. Therefore, Appendix A1 does not apply. Instead, plaintiff's counsel needed to submit evidence of the actual time worked on the case and his hourly rate. Since he has not done so, the court will not award any fees.

On the other hand, the court intends to grant the request for costs incurred in the case, as well as prejudgment interest at the rate of 7% per annum since May 1, 2016. Interest will be awarded in the amount of $4,110.28 and costs will be awarded in the amount of 693.50. Thus, the total judgment will be $21,340.90.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: RTM on **10/18/18**
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Acosta v. Ayala***
Case No. 14CECG02353

Hearing Date: October 23, 2018 (Dept. 403)

Motion: By Defendants for Default Judgment as to Ayala Corp., Ayala Farms, Inc., Bernardo Ayala, and B&A Int'l Farm Labor Servs., Inc.

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiff has not filed the mandatory CIV-100 form.

Further, the only defendant for which there is a record of default is the Ayala Corporation. In the papers, Plaintiff states that the other defendants against whom this judgment is sought had a default entered against them by the Court for a failure to appear at trial, but such an order does not appear to be in the record. Moreover, the trial court has no power to enter a default where a defendant files an answer but fails to appear for trial. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 859.) The options in such a case is to proceed with the case in the non-appearing parties' absence or continue the trial. (*Id.*) In any event, no default against any party other than Ayala Corporation appears to be in the record and, consequently, default judgment may not be entered on the terms set forth by Plaintiff.

Furthermore, the attorney's fees request does not comport with Appendix A1 to the Fresno Superior Court Local Rules. Even if a basis for departing from the rates indicated in the Appendix was shown, the fees sought would have to be re-worked depending on which parties the judgment was sought against (i.e. if only the Ayala Corporation is in default, attorney's fees could only be awarded for the time until the corporation's default).

Finally, the declaration by Mr. Acosta provides some proof for the loans made to Defendant (in the form of either promissory notes or cancelled checks). While there is a reference to "some payments made," Plaintiff provides no balance or ledger sheets to show such payments. Further, the payments and promissory notes indicate only the Ayala Corporation as the payee; there are no facts or evidence to make a prima facie case that the other entities or individuals should be liable for the debts.

For all these reasons, the request for default judgment is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: RTM on **10/19/18**
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Vanessa Piche v. Auberry Water Association***
Superior Court No. 17CECG03230

Hearing Date: October 23, 2018 (Dept. 403)

Motions: Defendant's motion to compel plaintiff's deposition, request for sanctions, and motion to continue trial

Tentative Ruling:

To deny defendant's motion to compel plaintiff's deposition and defendant's request for sanctions related thereto.

To grant motion to continue trial. (Cal. Rules of Court, rule 3.1332.) The current trial and trial readiness dates are vacated. Discovery deadlines will run from the new trial date. If the parties request a hearing pursuant to Local Rule 2.2.6, the court will assign a new trial date at that time. If the tentative is uncontested, the court hereby sets a trial setting conference on October 25, 2018 at 3:30 p.m. in department 403.

Explanation:

Motion to compel

Code of Civil Procedure section 2025.450, subdivision (a) provides for a motion to compel where the responding party fails to comply with proper discovery requests for deposition. However, when a deponent has failed to attend her deposition, the motion must be accompanied by a declaration stating that the attorney for the party making the motion has contacted the deponent to inquire about the nonappearance. (Code Civ. Proc., § 2025.450, subd. (b)(2).) Implicit in this statute is a requirement that the attorney making the inquiry must listen to the reasons offered for the nonappearance and make a good-faith effort to resolve the issue. (*Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 Cal.App.4th 1109, 1123–1124.) Also, some effort is required in all cases; there is no exception based on speculation that prospects for informal resolution may be bleak. (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438.)

Here, there is inadequate evidence that defendant made a good-faith effort at negotiation and informal resolution. To the contrary, the record reflects defense counsel's unwillingness to negotiate. First, defense counsel knew since late July 2018 that plaintiff was unavailable for deposition on August 9, 2018. Yet he never entertained the suggestion of alternate dates. Next, defense counsel drove from Sacramento to Fresno and reserved a court reporter for the August 9 deposition, even though he knew that Plaintiff would not be present. Finally, there is no evidence that defense counsel has made any attempt to inquire about Plaintiff's nonappearance, after the fact.

Sanctions

If a party deponent fails to appear at her deposition, monetary sanctions must be imposed unless the Court finds that the party acted "with substantial justification" or other circumstances render the sanction "unjust." (Code Civ. Proc., § 2025.450, subd. (g)(1).)

Here, it is undisputed that plaintiff failed to appear for her properly noticed deposition. However, defense counsel knew that plaintiff would not be appearing and decided to prepare for it and travel to the noticed location anyways. This renders sanctions unjust.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: RTM on **10/19/18**
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Ramirez v. FCA US LLC***
Court Case No. 18CECG00309

Hearing Date: October 23, 2018 (Dept. 403)

Motion: Plaintiffs' Motion to Compel PMQ Depositions and Production of Records

Tentative Ruling:

To grant. To award sanctions in the amount of 1,625.00. Sanctions shall be paid to Romano Stancroff, PC within 30 days of the date of clerk's service of this minute order.

FCA US LLC shall produce a person most knowledgeable on every category in the Deposition Notice served February 21, 2018 on a mutually agreed date before December 1, 2018. FCA shall produce documents as to every request for production in that Notice of Deposition as set forth herein, except with respect to category 12.

Explanation:

Code of Civil Procedure section 2025.280 provides, in relevant part: "The service of a deposition notice under Section 2025.240 is effective to require any deponent who is a party to the action … or employee of a party to attend and to testify … as well as to produce any document … for inspection and copying" (Code Civ. Proc., § 2025.280, subd. (a).) Code of Civil Procedure section 2025.450 provides, in relevant part: "If, after service of a deposition notice, a party to the action or employee of a party, or a person designated by an organization that is a party under Section 2025.230 … without having served a valid objection under Section 2025.410, fails to appear for examination … or to produce for inspection any document … the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document …" (Code Civ. Proc., § 2025.450, subd. (a).)

"*Valid Objections*"

FCA served its written objections by overnight mail on March 9, 2018, three days before the deposition. Section 2025.410 provides that written objections to errors or irregularities in the deposition notice must be served "promptly" and in no event less than three calendar days before the deposition date. "If an objection is made three calendar days before the deposition date, the objecting party shall make personal service of that objection pursuant to section 1011 on the party who gave notice of the deposition." (Code Civ. Proc., § 2025.410, subd. (b).) Accordingly FCA's objections were untimely and invalid pursuant to Code of Civil Procedure section 2025.410.

Meet and Confer:

FCA argues the motion should be denied because plaintiff failed to adequately meet and confer. However, where a deponent fails to appear, which was the case with FCA, the moving party need only inquire about the non-appearance. (Code Civ. Proc., § 2025.450, subd. (b)(2).) Plaintiffs' counsel's April 27, 2018 correspondence suffices.

Production of Documents:

A motion to compel production of documents at deposition must "set forth specific facts showing good cause justifying the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice." (Code Civ. Proc., § 2025.450, subd. (b)(1).) A party who seeks to compel production has met his burden of showing good cause by demonstrating a fact-specific showing of relevance. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

Defendant cites the Federal Rules of Civil Procedure, Rule 26(b)(1) as supporting its argument that discovery must be "proportional" to the litigation. However, the California Discovery Act has no similar provision. The citation to the Federal Rules of Civil Procedure and Chief Justice Roberts "remarks" are not persuasive authority.

Documents Relating to the Subject Vehicle:

Approximately half of the 26 document requests pertain to the subject vehicle. Under Civil Code section 1793.2, subdivision (d)(2), "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle."

With respect to restitution, Civil Code section 1793.2, subdivision (d)(2)(B) provides: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

Civil Code section 1794, subdivision (a) authorizes a buyer of consumer goods to bring an action for recovery of damages and other relief for the failure to comply with the Act. Under section 1794, subdivision (c): "If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered

under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages."

With the applicable provisions of the Song-Beverly Act in mind, the materiality of communications between plaintiffs and defendant are evident – they go to the history of repair attempts and any offers of compensation or buy-back. Documents generally relating to plaintiff or the subject vehicle may go to the existence of a defect and whether it was reasonably repaired, or may lead to admissible evidence. Repair records, repair orders, Customer Assistance Inquiry Records, VIN/CAIR history logs, warranty records, recalls or technical service documents clearly go to the existence of a defect.

Accordingly, defendant must produce all documents responsive to categories 1, 4-6, 10-11, 13-14, 20, 23-25. Request number 24 shall be interpreted as pertaining to plaintiffs.

Documents Relating to Policies and Procedures:

Most of the remainder of the categories relate to defendant's various policies and procedures. Warranty policies and procedures, and training materials are relevant to whether defendant willfully failed to comply with the Song-Beverly Act, as are Song-Beverly specific procedures. Requests 2-3, 15-19, 21-22 and 26 must be produced, except to the extent that request 26 can be read to require all of defendant's general policy and procedure manual, it need not be produced, only the warranty, including consumer protection/lemon law policies and procedures must be produced.

Documents Relating to the Deponent or Deposition Preparation:

Documents relating to the deponent's job description and those that were reviewed by the deponent in preparation for the deposition go to the qualifications of the deponent to testify and are discoverable.

Documents Relating to Buy-Back Requests:

These documents would be relevant to whether defendant willfully failed to comply with the Song-Beverly Act. The court notes that FCA maintains that it has no documents indicating that plaintiff's sought a pre-litigation buy-back. However, plaintiffs are entitled to put defendant to its proof.

Documents Relating to Field Reports:

Relevance has not been demonstrated for request 12. Although plaintiffs contend that the documents will "help show that the car was defective and defendant was aware of the car's defects, … that Defendant failed to fix the car within a reasonable number of attempts and that it willfully failed to comply with the act," the request is phrased too vaguely. Transmissions are a component or part, engines are components and parts, thus this request simply requires everything relating to a car with a transmission or engine, which is essentially every document in defendant's possession, without limitation. Such requests are improper under *Calcor Space Facility, Inc. v.*

Superior Court (1997) 53 Cal.App.4th 216, 222. Documents need not be produced in response to request 12.

Sanctions

Code of Civil Procedure section 2025.450, subdivision (g)(1) provides that "if a motion [compel appearance or production at deposition] is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The court awards monetary sanctions of $1,625.00.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: RTM on **10/19/18**
(Judge's initials) (Date)

Tentative Rulings for Department 501

(2)

Tentative Ruling

Re: ***Lillard et al. v. Tucker et al.***
Superior Court Case No. 18CECG00976

Hearing Date: None.

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: JYH on **10/22/18**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Perkins et al. v. Royo et al.***
Superior Court Case No. 18CECG02235

Hearing Date: ***If timely requested, oral argument will be held on:***
Thursday October 25, 2018 (Dept. 501) **@ 3:00 p.m.**

Motion: Defendants Kobe Royo and Paris Royo II's Motion for Change of Venue

Tentative Ruling:

To deny.

Explanation:

Defendants Kobe Royo and Paris Royo II move to change venue to Marin County, where all defendants reside, on the ground that this is a transitory action.

On timely motion, the court must order a transfer of an action "when the court designated in the complaint is not the proper court." (Code Civ. Proc. §§ 396b, 397(a).)

The burden is on the moving party to establish whatever facts are needed to justify transfer. Normally this requires affidavits or declarations containing admissible evidence. But the court may also consider facts alleged in the moving party's verified complaint if uncontroverted by opposing affidavits. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 929.)

The defendant moving to change venue must overcome the presumption that plaintiff has selected a proper venue: "[I]t is the moving defendant's burden to demonstrate that the plaintiff's venue selection is not proper under any of the statutory grounds." (*Fontaine v. Superior Court* (2009) 175 Cal.App.4th 830, 836, emphasis added.)

For venue purposes, actions are classified as "local" or "transitory." To determine whether an action is local or transitory, the court looks to the "main relief" sought. Where the main relief sought is personal, the action is transitory. Where the main relief relates to rights in real property, the action is local. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482 fn. 5.)

"[I]f both local and transitory relief are sought, the overall characterization will be controlled by the nature of 'the "main relief" sought, or "principal object" of the action.'" (*Massae v. Superior Court* (1981) 118 Cal.App.3d 527, 535.)

In the first cause of action for declaratory relief, plaintiffs allege that despite the fact that they obtained a fee simple interest in the property pursuant to the prior judgment and elisor deed, "Defendants claim that P.Royo's Community Property Interest did not pass to A.Royo upon P.Royo's death, that that the Oct 2015 Judgment

and the Elisor Deed therefore did not transfer P.Royo's Community Property Interest to Plaintiffs, and that P.Royo's Community Property Interest is presently either owned by A.Royo or otherwise subject to her control or administration." (Complaint ¶ 41.) These positions are incompatible.

In the second cause of action to quiet title, plaintiffs again allege that they obtained title to the entire property in fee simple (¶ 47), but that defendants "claim an interest adverse to Plaintiffs in the Property in that they claim the community property interest in the Property formerly owned by P.Royo was never transferred to Plaintiffs." (Complaint ¶ 50.) The cause of action seeks to quiet title to the claims of the defendants, "including the claims and clouds on the title to the Property …" (Complaint ¶ 51.)

In the third cause of action for injunctive relief, plaintiffs seek to resolve that cloud on the title to the property by requiring A.Royo to execute a Surviving Spouse Affidavit. (Complaint ¶¶ 54-55.)

With regards to all three causes of action, the court finds that the main relief sought is local because it relates to rights in real property.

No attorneys' fees will be awarded in connection with this motion. (Code Civ. Proc. § 396b(b).)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: JYH on **10/22/18**
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Greene v. Schellenberg***
Case No. 16CECG04085

Hearing Date: ***If timely requested, oral argument will be held on:***
Thursday October 25, 2018 (Dept. 501) **@ 3:00 p.m.**

Motion: Defendant Schellenberg's Motion for Summary Judgment, or in the Alternative Summary Adjudication

Tentative Ruling:

To grant defendant Schellenberg's motion for summary judgment as to the entire complaint. (Code Civ. Proc. § 437c.) Prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Explanation:

Malicious Prosecution: "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50.)

"In other words, in California, the commission of the tort of malicious prosecution requires a showing of an unsuccessful prosecution of a criminal or civil action, which any reasonable attorney would regard as totally and completely without merit, for the intentionally wrongful purpose of injuring another person." (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498–499, internal citations omitted.)

Also, "to create liability for malicious prosecution it is not enough to provide information to authorities during an ongoing criminal investigation. The person must 'take some affirmative action to encourage the prosecution by way of advice or pressure, as opposed to merely providing information.' Further, merely acting as a witness at trial - even a very valuable witness for the prosecution - does not make someone an active participant subject to liability for malicious prosecution. 'It is not enough that [the person] appears as a witness against the accused either under subpoena or voluntarily and thereby aids in the prosecution of the charges which he knows to be groundless. His share in continuing the prosecution *must be active, as by insisting upon or urging further prosecution*.' '[A]s a general rule, no liability, as for malicious prosecution, attaches merely by reason of testifying as a witness for the prosecution.'" (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1485, internal citations omitted, italics in original.)

Thus, "in most cases, a person who merely alerts law enforcement to a possible crime and a possible criminal is not liable if, law enforcement, on its own, after an independent investigation, decides to prosecute." (*Williams v. Hartford Ins. Co*. (1983) 147 Cal.App.3d 893, 898.)

Here, defendant concedes that he made the initial report to law enforcement in which he accused plaintiff of embezzling firearms and ammunition from his business. He also admits that he provided the police with documents generated in an internal audit of the business, which allegedly showed that plaintiff had been stealing from defendant's company. (Defendant's UMF No. 9.) However, defendant alleges that he made the report to law enforcement in the honest belief that plaintiff was embezzling from him, and that he did not exert any pressure or influence on the police or federal authorities to obtain the search warrant, arrest plaintiff, or indict him on federal charges. (Defendant's UMF No's 10 – 14, 17.) His evidence indicates that he presented the documents from the audit without altering or manipulating them in any way, and that the investigating detective never felt that defendant pressured him to bring charges or obtain a search warrant for plaintiff's home. (UMF No's 10, 11.) In fact, Detective Schneider felt that defendant presented the evidence to him in a "neutral" way. (UMF No. 10.)

Defendant also never testified before the federal grand jury that indicted plaintiff. (UMF No. 14.) Plaintiff himself admitted in his deposition that he did not know what role defendant played in obtaining the federal indictment, and he was unable to point to any specific documents that defendant might have falsified in order to manipulate law enforcement into investigating him. (UMF No's 14, 15.) According to defendant's declaration, he only spoke to the federal investigators and provided them with documents when they called him, and he did not initiate any contact with them. (UMF No. 13.)

Also, while plaintiff has apparently contended that defendant fabricated documents or manipulated their contents because the hard drive on which he kept his original audit information crashed and he was unable to produce it, defendant has produced a flash drive containing all of the data from the hard drive. (UMF No. 16.) Nevertheless, plaintiff has been unable to point to any documents that support his claim that defendant presented falsified documents to the police or federal law enforcement in order to have plaintiff falsely accused of embezzlement. (UMF No. 15.)

Thus, the undisputed facts show that defendant did not "initiate" the criminal investigation of plaintiff for the purposes of the malicious prosecution cause of action. He merely reported suspected criminal activity to the police and provided them with documents that he honestly believed showed that plaintiff had embezzled firearms and ammunition from him. He did not exert any pressure or give any advice to law enforcement that led to the plaintiff being searched and then indicted in federal court. Nor is there any evidence that he presented false documents to police, or that he provided false testimony to the grand jury. Indeed, he did not testify before the grand jury at all. Plaintiff has not filed a timely opposition, so he has not met his burden of showing that there are any triable issues of material fact with regard to whether

defendant initiated the prosecution against him.[1] Since the evidence shows that defendant only reported a suspected crime to police and provided them with accurate and neutral information about the crime without exerting any pressure or giving any advice, he cannot be held liable for malicious prosecution. (*Zucchet v. Galardi*, *supra*, 229 Cal.App.4th at p. 1483.)

In addition, defendant's evidence shows that there was probable cause for the prosecution as the federal grand jury indicted plaintiff, so plaintiff cannot prove the element of lack of probable cause necessary to prevail on his malicious prosecution claim. "[T]he fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut… [T]hat rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford, supra,* at p. 900.)

Furthermore, where a magistrate signs a search warrant based on the affidavit of the investigating officer, the warrant creates a presumption of probable cause for the search that may only be rebutted by a showing that the warrant is invalid as a matter of law. (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 231.)

Here, defendant has presented a copy of the federal grand jury indictment of plaintiff. (Request for Judicial Notice, Exhibit A. The court intends to take judicial notice of the indictment as an official court record under Evidence Code section 452, subdivision (d).) As discussed above, defendant did not testify before the grand jury, so the indictment was not obtained based on any false or fraudulent testimony by him. (UMF No. 14.) While plaintiff seems to contend that defendant provided false documents and statements to the police or federal agents that formed the basis for the indictment, he has not been able to point to any specific documents that were allegedly falsified by defendant, and he admitted that he did not know what role defendant played in obtaining the indictment. (UMF No. 15.)

In addition, the police obtained a search warrant signed by a Superior Court judge before searching plaintiff's residence and obtaining evidence that appeared to support the theory that plaintiff had been embezzling from defendant. (UMF No. 11.) Thus, the fact that a judge executed a search warrant based on the detective's affidavit further indicates that there was probable cause to believe plaintiff had committed a crime. Again, plaintiff has not filed timely opposition or presented any evidence to show that the warrant was invalid on its face, or that there was no probable cause to charge him with a crime. Therefore, plaintiff cannot prevail on his malicious prosecution cause of action, and the court intends to grant summary adjudication of the second cause of action.

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[1] Plaintiffs' counsel did file a request to file late opposition on October 9, 2018, the same date his opposition was due, and later filed an untimely opposition brief, response to separate statement, and declarations in support of opposition on October 16, 2018, a week after the deadline for filing opposition. However, the court declines to consider the untimely opposition brief or evidence, as it was filed without leave of court a week after the statutory deadline for filing opposition had passed. (*Hobson v. Raychem Corp*. (1999) 73 Cal.App.4th 614, 623, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6; *Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765.) Thus, defendant's motion is effectively unopposed.

Civil Code Section 52.1: Under Civil Code section 52.1, subdivision (b), "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages…"

Here, plaintiff has alleged that "Defendant maliciously, and without probable cause, initiated or procured the arrests and prosecution of Brandon Greene through numerous coercive and wrongful acts, including those set forth hereinabove, thereby violating Mr. Greene's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, as well as Article 1, sections 7 and 13, of the California Constitution." (Complaint, ¶ 39.) He also alleges that "Defendant was actively instrumental in the investigation, arrests, and prosecution carried out by the Reedley Police Department; the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives; and/or the U.S. Attorney's Office. These acts were known to Greene as they were occurring and were intended to coerce a violation of his state and federal constitutional rights, as alleged hereinabove." (*Id*. at ¶ 41.)

However, as discussed above with regard to the malicious prosecution action, the undisputed facts show that the investigation and charges against plaintiff were not brought without probable cause. Indeed, the filing of the federal indictment alone is enough to raise a presumption of the existence of probable cause, and plaintiff has failed to rebut the presumption by pointing to any evidence that the indictment was procured through fraud or false testimony. Nor has plaintiff pointed to any evidence that defendant did anything beyond reporting a suspected crime and provided accurate, neutral information regarding the basis for his suspicions. There is no evidence that defendant exerted any pressure or influence in an attempt to have the police or the federal authorities charge plaintiff with a crime. Plaintiff has failed to submit timely opposition or point to any evidence that would raise a triable issue of material fact as to the issues of lack of probable cause or any alleged pressure by defendant to bring the charges. Therefore, the court intends to grant summary adjudication of the first cause of action for violation of section 52.1.

Loss of Consortium: Finally, the court intends to grant the motion for summary adjudication of Renee Brandt's loss of consortium claim. Since Brandt's claim is entirely dependent on Greene's claims, and those claims fail as a matter of law, then Brandt's claim must fail as well. (*Rodriguez v. Bethlehem Steel Corp*. (1974) 12 Cal.3d 382, 408.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: JYH on **10/22/18**
(Judge's initials) (Date)

Tentative Rulings for Department 502

(24)

Tentative Ruling

Re: ***Steitz v. Ramos***
Court Case No. 18CECG01417
AND
City of Fresno v. Ramos
Court Case No. 18CECL03245

Hearing Date: October 23, 2018 (Dept. 502)

Motion: Defendant Ramos' Motion to Consolidate Related Actions

Tentative Ruling:

To grant complete consolidation, except that the lead case shall be Case No. 18CECG01417. Defendant Ramos is ordered to file and serve a notice of entry of this order in both actions, properly captioned with both case names and numbers. Other than this, all further documents filed in the case shall be filed only in the lead case, and shall include the caption and case number of the lead case, followed by the case number of the other consolidated case. (Cal. Rules of Court, Rule 3.350, subd. (c)-(d).)

Explanation:

Moving party failed to comply with the notice of motion provisions of subdivision (a)(1) of Rule 3.350: 1) the Notice of Motion does not list the parties in each case and name those who have appeared, and their attorneys; 2) it does not include the caption and case number of both cases, but instead lists only the civil unlimited case number; and 3) it was filed only in the civil unlimited action, and not in both actions as required. However, defendant Ramos did comply with subdivision (a)(2) in filing the memorandum and supporting declaration in only one case (Case no. 18CECG01417), and serving all attorneys of record in each action. He also calendared the motion in both cases.

The court will grant the motion, despite the procedural flaws, given that notice was given to all interested parties, Plaintiff City of Fresno has filed a notice of non-opposition, and Plaintiff Steitz has not opposed the motion, so has not shown any prejudice resulting from the errors. This is in the interest of judicial economy.

Complete consolidation is warranted. However, the civil unlimited action must be designated as the lead case, since Plaintiff Steitz appears to be seeking damages above the jurisdictional limit for a civil limited action.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued by: DSB on **10/19/18**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***City of Fresno v. State Center Community College District et al.***
Superior Court Case No. 16CECG01307

Hearing Date: October 23, 2018 (Dept. 502)

Motion: Plaintiff's Motion to Compel Further Discovery Responses

Tentative Ruling:

To grant as to Request for Admission nos. 5 and 6, and to Form Interrogatory no. 17.1. Within 10 days of service of the order by the clerk, defendant State Center Community College District shall serve further responses to Request for Admission nos. 5 and 6 in conformance with this order. To deny the request for sanctions.

Explanation:

Requests for Admission:

Each answer "shall be as complete and straightforward as the information reasonably available to the responding party permits." (Code Civ. Proc. § 2033.220(a).) Thus, absent an objection, the response must contain one of the following:

- An admission;
- A denial;
- A statement claiming inability to admit or deny.

(Code Civ. Proc. § 2033.220(b).) The answer must be "as complete and straightforward" as the information available *reasonably permits* and must "*(a)dmit* so much of the matter involved in the request as is true … or *as reasonably and clearly qualified* by the responding party." (Code Civ. Proc. § 2033.220(a), (b)(1), emphasis added.)

In a motion to compel further responses, the responding party has the burden of substantiating any objections to the discovery. *(D.L. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729.)

In response to RFA no. 5, after asserting various objections, defendant responds, "Without waiving its objections, defendant responds as follows: Admit that Richard Lindstrom made that representation in his May 19, 2015 email. However, it pertained to a subsequent remedial or precautionary measure."

The motion is granted as to RFA no. 5 because it is unclear whether the response is an unqualified admission. It sounds like an admission, but defendant also provided a form interrogatory no. 17.1 response explaining the response to the request for admission – a 17.1 response is only called for if there was not an unqualified admission. The response seems to incorporate argument in explaining that it pertained to a subsequent remedial or precautionary measure, which really isn't pertinent to whether

Mr. Lindstrom made the referenced finding. Defendant must provide a clearer admission, denial, or qualified admission.

Defendant only attempts to substantiate two of the objections asserted in the response – Evidence Code § 1151, and that the request is not full and complete in and of itself.

Evidence Code § 1151 provides,

> When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

As the moving papers point out, section 1151 concerns admissibility of evidence, not discoverability. It does not limit the scope of discovery. (*Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588.) But in this context the court sees no problem with raising the objection at this stage in order to preserve it, so long as a substantive response is provided.

Code of Civil Procedure § 2033.060(d) requires that each request for admission shall be full and complete in and of itself. Defendant raises contends that because the request references Mr. Lindstrom's May 19, 2015 email, the request is not full and complete in itself.

That reference is not a problem in the context of this request. While it does reference another document, the substance of the statement in that document is described in the request for admission. The RFA itself contains all of the information necessary to respond.

Accordingly, in defendant's further response, all objections other than that based on Evidence Code § 1151 shall be removed.

Plaintiff only takes issue with the objections raised to RFA no. 6. Defendant only attempts to substantiate two objections.

First is the objection that the request is vague and ambiguous. Defendant explains that the RFA references the rangemasters' conduct on May 19, 2015. But the incident occurred on April 20, 2015. May 19, 2015 is not relevant to the litigation.

Be that as it may, that doesn't render the RFA vague and ambiguous. If the reference to May 19, 2015 is a drafting mistake, any response to it will simply be of no use to plaintiff.

There is no merit to the objection that the request is not full and complete in itself.

Therefore, defendant shall to provide a further response omitting all objections, and simply denying the RFA.

Form Interrogatories:

Plaintiff moves to compel further responses to Form Interrogatory no. 17.1 with regards to RFA nos. 5 and 6.

As to RFA no. 5, explaining why a further response should be compelled, plaintiff merely states in the separate statement, "If Request for Admission No. 5 was an admission, there should be no response to Form interrogatory 17.1. If it is a qualified admission, what is being qualified should be delineated and clear." However, it is unclear what plaintiff expects here. Plaintiff does not explain how the factual response to RFA no. 5 is inadequate. It does not appear to be inadequate to the court. In the reply brief plaintiff takes issue with the reference to the objections to RFA no. 5. However, that is an issue that should have been raised in plaintiff's separate statement of items in dispute, which is supposed to be the only document the court reviews to rule on the motion. (Cal. Rules of Court, Rule 3.1345.)

As for RFA no. 6, as plaintiff concedes in the reply that the referenced date of May 19, 2015 is irrelevant to this action, it is unclear what further response would be warranted.

The motion is denied as to Form Interrogatory no. 17.1.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: DSB on **10/19/18**
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Machado v. Curiel***
Case No. 14CECG03448

Hearing Date: October 23, 2018 (Dept. 502)

Motion: Default Hearing

Tentative Ruling:

To deny the request for default judgment without prejudice unless Plaintiff can address the issues below.

Explanation:

On April 27, 2017, June 21, 2017, September 7, 2017, April 18, 2018, and August 30, 2018, this Court issued rulings on Plaintiff's prior requests for entry of default judgment. The rulings took the hearing off calendar or denied the request for default without prejudice, and noted, in pertinent part, the following:

> "On November 17, 2014, Plaintiff filed a Complaint for damages for fraud against defendants. According to the Case Management statements filed since then, the parties had agreed to some kind of settlement based on proceeds from the sale of property. Ultimately, this money was to be disbursed in May, 2016. Plaintiff filed a First Amended Complaint on April 26, 2016. The First Amended Complaint alleged intentional misrepresentation, concealment, negligence and various other causes of action against defendants stemming from a business deal concerning a property located on Belmont Avenue in Fresno, California.
>
> "The complaint was served by publication effective on October 17, 2016.
>
> "No answer has been filed.
>
> "Default was entered on February 7, 2017.
>
> "On April 25, 2017, Plaintiff filed declarations from Plaintiff's counsel Tomas Nunez and Plaintiff Maria Machado in support of the judgment. According to the declarations, Plaintiff paid $53,000 to defendant in reliance on Defendant's fraudulent misrepresentations. Since then, according to the declarations, Plaintiff has recovered $37,237.00. Nevertheless, Plaintiff somehow seeks $24,685.33 (not the $15,736.00 difference), in part to reimburse for attorney fees and costs. However, Plaintiff nowhere pointed to authority for recovering attorney's fees in the supporting documents. Furthermore, the paperwork currently on file with the Court is plainly insufficient.

"California Rule of Court 3.1800 provides that a Plaintiff seeking a default judgment must provide certain documents in support of their request. These include Mandatory Form CIV-100, as well as the following pertinent requirements:

(3) Interest computations as necessary;
(4) A memorandum of costs and disbursements;
(5) A declaration of nonmilitary status for each defendant against whom judgment is sought;
(6) A proposed form of judgment;
(7) A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under Code of Civil Procedure section 579, supported by a showing of grounds for each judgment [¶], and;
(9) A request for attorney fees if allowed by statute or by the agreement of the parties.

"To date, Plaintiff has not met these requirements, nor filed the request for Court Judgment on the mandatory CIV-100 form (the form currently on file with the Court, dated February 7, 2017, seeks only entry of default, and not a Court Judgment). Therefore the Court will take the matter off calendar unless Plaintiff can meet these deficiencies before the hearing."

Plaintiff dismissed the Doe Defendants on July 25, 2017.

In the Court's April 18, 2018 order, the Court ruled as follows:

"On March 14, 2018, Plaintiff filed papers in support of the Default Judgment, including the mandatory form CIV-100. However, CIV-100 is not fully filled out: there is no entry in paragraph 2 for the total judgment. A completed CIV-100 reflecting the amount in the judgment must be on file before judgment can be issued.

"As the Court's prior orders noted, the total amount Plaintiff could claim is $15,736.00 (the $53,000 sought in the First Amended Complaint less credits of $37,237 as described in Plaintiff's declarations in support of the Default Judgment submitted on April 25, 2017) but the proposed judgment submitted on March 14, 2018 seeks $15,685.33. Although the difference is not large, there should be some explanation for that amount. As noted above, the last declaration on file sought $24,685.33. Plaintiff must submit evidence supporting the amount claimed in the proposed judgment.

"Finally, in the proposed judgment it appears that Plaintiff may be seeking punitive damages. However, on a default, in order to preserve the right to seek punitive damages, a plaintiff must serve defendants with a statement prescribed by Code of Civil Procedure §436.115, subdivision (b). It is unclear from the file if this notice was served. Absent service of the statement, punitive damages cannot be awarded."

As of October 19, 2018, Plaintiff has submitted no new papers. Therefore, the request for default judgment is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: DSB on **10/19/18**
(Judge's initials) (Date)

Tentative Rulings for Department 503

(2) **Tentative Ruling**

Re: ***Calderon v. Inman***
Superior Court Case No. 15CECG01841

Hearing Date: October 23, 2018 (Dept. 503)

Motion: Defendant Donald Inman's motion for terminating sanctions and monetary sanctions

Tentative Ruling:

To grant defendant Donald Inman's motion for terminating sanctions and an order dismissing the complaint of plaintiff Eduardo Calderon. (Code Civ. Pro. §2023.030(d)(3).) Pursuant to Code of Civil Procedure section 2023.030(d)(1), the complaint filed by plaintiff Eduardo Calderon against defendant Donald Inman is dismissed with prejudice. The entire action is dismissed.

To grant defendant Donald Inman's motion for monetary sanctions, in part. Plaintiff Eduardo Calderon and his attorney or record, jointly and severally, are ordered to pay sanctions in the amount of $400 to Ericksen Arbuthnot within 30 days after service of this order. (Code Civ. Pro. §2023.030(a).)

Explanation:

There is evidence that plaintiff Eduardo Calderon has engaged in misuse of the discovery process. There is no indication that any lesser sanction will result in plaintiff responding to the outstanding discovery. There is no indication that a lesser sanction will compel compliance with the discovery laws.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/11/18**
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Alexandra Mendoza***
Superior Court Case No. 18CECG02861

Hearing Date: October 23, 2018 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/11/18**
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Adrian Vasquez***
Superior Court Case No. 18CECG02862

Hearing Date: October 23, 2018 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/11/18**
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Stafford v. Avenal Community Health Center***
Superior Court Case No. 17CECG03822

Hearing Date: October 23, 2018 (Dept. 503)

Motion: (1) Defendant's Motion to Compel Plaintiff's Deposition Testimony
(2) Defendant's Motion to Compel Deposition of Julio Palacios

Tentative Ruling:

(1) To grant the motion to compel plaintiff to submit to further deposition and to provide further responses to all deposition questions specified in the separate statement of disputed responses filed by defendant on September 21, 2018. The further deposition shall take place within 20 days of service of the order by the clerk on a date to be agreed upon by the parties. (Code Civ. Proc. § 2025.480(a).) To impose $4,925 in monetary sanctions to be paid by plaintiff to defendant's counsel within 30 days of service of the order by the clerk. (Code Civ. Proc. §§ 2023.030(a), 2025.480(j).)

(2) To deny the motion to compel the deposition of Julio Palacios, without prejudice to the filing of a future motion showing proper service on Mr. Palacios.

Explanation:

(1) Motion to Compel Plaintiff's Deposition Testimony

As the moving papers note, an objection to a deposition question does not excuse the deponent from the duty to answer unless the objecting party demands the deposition be suspended to allow for the filing of a motion for protective order. (Code Civ. Proc. §§ 2025.460(b), 2025.470.) Otherwise, the deponent must answer the question and the testimony will be received, subject to the objection. (Code Civ. Proc. § 2025.460(b).)

In this case, plaintiff refused to answer many questions at her deposition, asserting various objections, but never sought a protective order. There is no any justification for plaintiff's refusal to answer the questions subject to objections raised at the deposition.

Plaintiff's supplemental opposition is largely based on objections not made at the deposition. Those objections are waived, and in any case, do not appear to have any merit. (See Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2018) ¶ 8:725; Code Civ. Proc. § 2025.460; *International Ins. Co. v. Montrose Chemical Corp. of Calif.* (1991) 231 Cal.App.3d 1367, 1373 fn. 4.)

Sanctions in the form of reasonable attorneys' fees and costs must be awarded. (Code Civ. Proc. § 2025.480(j).) The court will not include in the sanctions award the

cost of the deposition transcript, as the cost appears extraordinarily high and is not supported by any evidence or proof of the cost. (See Stuart Dec. ¶ 15.)

(2) Defendant's Motion to Compel Deposition of Julio Palacios

This motion cannot be granted at this time because the motion to compel has not been served on Mr. Palacios, a nonparty. Nonparty deponents must be personally served with the notice of motion to compel. (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2018) ¶ 8:797; Cal. Rules of Court, Rule 3.1346.)

The court understands the difficult position defendant is in, as plaintiff has refused without justification to provide any contact information for Mr. Palacios. However, the court has granted defendant's motion to compel plaintiff to provide answers at her deposition. That includes questions about Mr. Palacio's address and other contact information. Plaintiff must provide that information. Defendant can then serve Mr. Palacios with the motion to compel and proceed with the motion.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/19/18**
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***McKenzie v. Ramirez and Fresno Irrigation District et al.***
Superior Court Case No. 18CECG01421

Hearing Date: October 23, 2018 (Dept. 503)

Motion: Demurrer by Defendant Fresno Irrigation District to the original complaint

Tentative Ruling:

To sustain the general demurrer to the sixth cause of action without leave to amend. To sustain the general demurrer to the first and fifth causes of action with leave to amend. An amended complaint in conformity with the court's ruling shall be filed and served within 10 days of service of this minute order, plus 5 days for service via mail. (CCP § 1013.) All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Government Code section 815.2 provides, in pertinent part:

> (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

While Plaintiff acknowledges the language of this statute, he also misconstrues it. The statute cannot be interpreted to mean that Plaintiff can allege common law causes of action against Defendant Fresno Irrigation District. Such an interpretation would vitiate the Government Claims Act enacted by the Legislature in 1963, which both permits and limits governmental liability. Generally, all public entities, state and local, are now liable in tort to the extent declared by statute, subject to stated immunities and defenses. (See Gov. Code § 815 et seq.) Public employees are liable to the same extent as private persons, again subject to various immunities and defenses. (See Gov. Code § 820 et seq.)

Accordingly, "[e]xcept as otherwise provided by statute," a public entity "is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code § 815(a).) This provision "abolishes all common law or judicially declared forms of liability." (Legislative Com. Comment to Gov. Code § 815.) Thus, except as required by the United States or California Constitutions (e.g., under the eminent domain guarantee), liability must be based on a California statute. (*Sava v. Fuller* (1967) 249 Cal.App.2d 281, 284; *Susman v. Los Angeles* (1969) 269 Cal.App.2d 803, 808; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 Cal.App.3d 814, 819.) Common law causes of action cannot be alleged

against a government entity. (*Lloyd v. Los Angeles* (2009) 172 Cal.App.4th 320, 329; *McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1217.)

Here, Plaintiff has alleged causes of action for motor vehicle negligence (first cause of action), negligent entrustment (fifth cause of action) and "liability pursuant to 1714" (sixth cause of action) against the Defendant Fresno Irrigation District, a public entity. Plaintiff has conceded that the sixth cause of action is defective. Therefore, the general demurrer to the sixth cause of action will be sustained without leave to amend. As for the first and the fifth causes of action, they are based upon common law. Accordingly, the general demurrers to the first and fifth causes of action will be sustained with leave to amend.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/19/18**
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Agaronyan v. United First, Inc.***
Superior Court Case No. 18CECG01781

Hearing Date: October 23, 2018 (Dept. 503)

Application: By Plaintiff for the entry of default judgment

Tentative Ruling:

To grant the application. The judgment will be signed. The hearing will be taken off calendar.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued by: KAG on **10/22/18**
(Judge's initials) (Date)